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In the
Supreme Court of the United States

October Term, 1965

No. [redacted] 184

MAURICE M. FILISTER AND J. J. BLISS

Appellants

vs.

CITY OF MINNEAPOLIS AND WILLIAM H. BORGERT, FLORENCE H. BORGERT, HAROLD G. BROTHERS, SALLY BROTHERS, JACK A. ISAAMAN AND IVY ISAAMAN

Appellees

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

JURISDICTIONAL STATEMENT

JOSIAH E. BRILL
510 Builders Exchange
Minneapolis, Minnesota 55402
Counsel for Appellants

Hayward-Court Brief Prtg. Co., Mpls., Minn. 55415

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Appellees

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

JURISDICTIONAL STATEMENT

Appellants appeal from the Judgment of the Supreme Court of Minnesota, which affirmed the decision of the trial court of Hennepin County, Minnesota in this case. The Judgment of the Supreme Court of the State of Minnesota became final on March 9, 1965 when Appellants' Petition for a rehearing was denied by that Court. The Judgment sustained the validity of a municipal ordinance of the City of Minneapolis.

This jurisdictional statement is submitted in order to es-

tablish to the satisfaction of this Court that it has jurisdiction of this appeal and that substantial questions are presented under the Constitution of the United States.

OPINION BELOW

The opinion of the court below in this matter is styled:

Maurice M. FILISTER, plaintiff, and J. J. Bliss, intervenor, Appellants

v.

CITY OF MINNEAPOLIS, defendant, and William H. Borgert, et al., intervenors, Respondents.

A copy of the opinion is attached hereto as Appendix. Notice of Appeal to the Supreme Court of the United States was filed by the appellants with the Clerk of the Supreme Court of the State of Minnesota on the 7th day of May 1965, and duplicate original copies of such Notice of Appeal were served on attorneys for respondents as shown by the affidavit heretofore filed in this Court, on the same day.

JURISDICTION

It is believed that 28 U.S.C., Section 1257 (2) is the statutory provision which establishes the jurisdiction of the Supreme Court of the United States to hear this appeal. Some of the cases supporting the application of this statute are: *Charles Williams, Petitioner v. Paul E. Kaiser, Warden Missouri State Penitentiary,* 323 U.S. 471, 89 L.Ed. 398; *Marian S. Honeyman, App. v. Herbert G. Hanan,* 300 U.S. 14, 81 L.Ed. 476; *Home Insurance Company, et al., v. C. J. Dick, et al.,* 281 U.S. 397, 74 L.Ed. 926; *Rosalyn Zucht, by A. D. Zucht, next friend, Plff. in Err, v. W. A. King, et al.,* 260 U.S. 174, 67 L.Ed. 194.

ORDINANCE INVOLVED

The ordinance involved is a comprehensive zoning ordinance adopted by the City of Minneapolis, Minnesota on April 3, 1924 and a subsequent new comprehensive zoning ordinance adopted by the same City on July 19, 1963. These ordinances provide that the land involved in this lawsuit may not be improved for any purpose whatsoever by the erection of buildings other than single family residences (and other similar buildings, stipulated by the parties not to be involved in this case). These ordinances are not printed here because they are too bulky and believed to be unnecessary for the purpose of this case. These ordinances are cited as Minneapolis Comprehensive Zoning Ordinance of April 3, 1924 and Minneapolis Comprehensive Zoning Ordinance of July 19, 1963. Copies will be mailed to the Clerk of this Court if deemed necessary. The substance of the pertinent text is as above stated.

QUESTIONS PRESENTED

The questions presented are:

1. Was the appellants' property taken in violation of the Fourteenth Amendment of the Constitution of the United States either because its entire market value was destroyed or because it was substantially all destroyed?

2. Can the Supreme Court of Minnesota avoid the impact of the Fourteenth Amendment in relation to this case by the use of the following methods?

> When the trial court said, in relation to the testimony showing what it would cost to make the land suitable for use for the erection of single family dwellings because of its bad soil, that "the total cost to the plain-

tiffs of lots so piled and filled would be somewhat less than the value of building lots of comparable size in the area" and the trial court refused, upon written request, to clarify what it meant by the phrase "somewhat less" or to make any findings whatsoever as to the actual figures as to costs or market value involved and where the undisputed testimony demonstrated that instead of the cost being somewhat less it would be greatly more,

Was the Supreme Court of Minnesota justified in construing that language, especially under those circumstances, to mean that as zoned the property had some substantial value?

3. Was the Supreme Court of Minnesota justified in ignoring the evidence which demonstrated that the cost of making the lots suitable would be greatly more than the value of building lots of comparable size in the area for residential purposes, such evidence being without dispute in the Record?

4. If the Supreme Court is found not to have been justified in ignoring the Fourteenth Amendment by reason of any of the foregoing, we will then be met with the next question.

5. Was the Supreme Court of Minnesota justified in incorporating a non-federal issue into the case when the issue was not pleaded or tried and where the lower court made no finding on it and where the point was not raised except by the Supreme Court for the first time at the oral argument on the appeal?

Was the Supreme Court of Minnesota justified on the

basis of the decision in the Kentucky case of *Hodge v. Luckett,* 357 S.W.(2d) 303, 305, in holding that these appellants had the burden of proving not only that the ordinance was confiscatory but also proving by clear and convincing evidence that the setting aside of the ordinance would not result in any substantial detriment to neighboring property, improved in reliance on the validity of the ordinance?

In addition, would such a rule be used to defeat the appellants, when the record is conclusive that the improvement of neighboring property was not in reliance on the zoning of appellants' property and where the evidence showed, without dispute, that there was no detriment?

The question is further asked whether such a statement with respect to burden of proof is applicable here even though it may have been properly applied in the *Hodge* case since in the *Hodge* case the ordinance was not claimed to have violated the Fourteenth Amendment to the U. S. Constitution.

STATEMENT OF THE CASE

Appellant Bliss is the owner of a vacant piece of land in the City of Minneapolis, of about eight acres in size, wholly unimproved (R. p. 133). The appellant Filister has an outstanding option for the purchase of the property (R. p. 133-Exhibits D & E). That the City of Minneapolis zoned that property together with other property in the vicinity so as to limit the improvement thereof to single family detached dwellings (Admitted in Pleadings). It was stipulated that the other uses permitted were not material to the case.

The plaintiff alleged that the land is swampy and en-

tirely unsuitable for use without piling. That the necessary cost of piling the land is such that it would exceed the value of the land for any purpose whatsoever for which it could be used within the boundaries of the zoning ordinance. That if appellants were permitted to erect 2½ story apartments on the site the cost of piling and filling and grading the land for that purpose would not be prohibitive but would leave net the value of the property at over $150,000.

Testimony was offered on both sides as to the cost of making the land suitable. For the purpose of the trial and the appeal and for the purposes of the requested review by this Court, we accept and rely upon the testimony of the witness Vasatka for the defendants for such costs (R. pp. 297-309; 315-340). In order to compare this cost with the fair market value of the land for use for single family detached residences, we called a thoroughly qualified expert who fixed the market value of the lots so improved (R. pp. 243, 253, 259, 260, 261, 374, 379, 387). The defendants offered no testimony as to the fair market value of the plaintiffs' lots after the bad condition was corrected. The defendants did offer testimony over the objection of these appellants as to the price for which lots in an adjoining block have been sold but made no attempt to compare them with the lots involved in this case (R. pp. 437-445). On the basis of this testimony, the trial court concluded that the cost of making the land suitable would be "somewhat less" than its fair market value after so made suitable. The lower court also refused to clarify this finding as requested, saying it had gone as far as it could. The Court said:

> "It is not possible for this Court to meaningfully make more specific findings" (R. p. 46).

The testimony as to the cost of making the land suitable which we used is entirely that of the expert for the respondents, Mr. Vasatka (R. p. as above). There appears to be no reason to examine it because we accept it at its full value.

Mr. Gullickson testified that the erection of the proposed apartment buildings would not reduce the market value of the properties in the neighborhood (R. p. 388).

The motion for clarification of the court's finding on the ultimate issue and for amended findings is found in the record at pages 34-36 inclusive.

The case upon which the Supreme Court relied, to-wit, *Hodge v. Luckett* (Ky.) 347 S.W.(2d) 303, 305, is not a case involving the Fourteenth Amendment.

That the trial court in its memorandum attached to its decision (R. p. 31, f. 3) found that approximately one-fourth of the tract consists of soil and subsoil which would not require piling. This finding completely ignored the fact that even though this portion of the property did not require piling (and the undisputed testimony was that it was less than 15% of the tract. Refer to Petition for Re-argument,), it would require having the muck removed and fresh dirt brought in, the cost of which, together with the cost of extra waterproofing, would still exceed the value of the lots for single residence purposes.

It is believed that the Court should sustain our appeal upon the basis of the case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S. Ct., 158, 160, 67 L.Ed. 322, 326, as applied to the finding of the lower court that "the cost of making the land suitable is somewhat less than the value of the lots after this cost was expended."

The language of the *Pennsylvania Coal Co.* case is quot-

ed with approval in the case of *Alexander v. City of Minneapolis,* 267 Minn. 155 at page 161 as follows:

> "* * * The protection of private property in the Fifth Amendment * * * provides that it shall not be taken for such (public) use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. (Citing case.) When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
>
> "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. (Citing cases.) We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

The appellees did not appeal from the decision which is based on this finding. The Supreme Court of Minnesota was not justified in distorting its language.

However, if necessary so to do, the Court will find, by an examination of the record above referred to, that the cost of making the land suitable was greatly in excess of the fair market value of the lots so made suitable on the undisputed testimony in the case.

The Supreme Court of Minnesota attempted to avoid our argument as above set forth first by:

(a) completely ignoring the case of *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415, 43 S. Ct. 158, 160, 67 L Ed. 322, 326.

(b) by misstating the language of the lower court with respect to its findings of the fact on the issue of confiscation. No explanation was given.

(c) by ignoring many cases from other states cited in connection with our Petition for Reargument (this is part of the certified record).

(d) With respect to the appellants' offer to improve the property with a fine set of apartments beautifully landscaped instead of using it for other uses, which might be permitted there if the zoning was invalid (R. p. 263, Exhibits I, J & K and R. p. 266), such as industrial uses, the Court, apparently thinking that these were quite acceptable, said it could not compel the result because Filister might not exercise his option. (See opinion in Appendix.) It ignored the fact that Mr. Bliss, the fee owner, had made the same offer in his Complaint in Intervention (R. p. 15) and that if Filister abandoned his option, the fee owner would still be bound by the proposal. Moreover the Court could bind him under our Declaratory Judgment Statute, as was done in the case of *Morris County Land Improvement v. Township of Parsippany-Troy Hills,* 40 N.J. 539.

Our Declaratory Judgment Statute (Minnesota Statutes Annotated 555.01 and Minnesota Statutes Annotated 555.08 for Supplemental Relief) shows that the Court can retain jurisdiction to compel performance of such a proposal. In fact, our Court did this without urging in the case of *Katherine Elizabeth Pearce and Marie Elizabeth Pearce v. Village of Edina,* 263 Minn. 553, 108 N.W.2d 659.

(e). On the question of value, the Court, apparently feeling the need of doing something about the lower court's finding of "somewhat less" and not being satisfied with distorting this by changing the language to "some substantial value", used material having no basis in the record, to buttress its conclusion. The Court said, Mr. Bliss testified that he thought $8,000 an acre was reasonable for the land before he completely understood the soil problems. (See Opinion.) We find no such statement in the record, but if it was, it would not have any bearing on the case because we are not concerned for this purpose, with the land in good condition.

Then the Court adds a "final touch" by referring to the option price as evidence of value. (See Option.) The record is conclusive that the option price would not be exercised unless the zoning was declared invalid.

A good discussion of the problem here involved in its relation to the Fourteenth Amendment is found in *Arverne Bay Construction Company v. Edwin H. Thatcher,* 278 N.Y. 222, 15 N.E.2d 587, 117 A.L.R. 1110.

The question of estoppel or laches is irrelevant in this case.

A court may inquire into a claim of laches or estoppel in a case where the ordinance is valid, and one is asking for a favor; but we submit, there is no case in the books anywhere which applies this rule with respect to an ordinance invalid by reason of the Fourteenth Amendment.

The Court's attempt to inject a non-federal issue is met by appellants' reference to the facts above set forth and to the following cases:

Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux, 73 L.Ed. 931, 279 U.S. 737;

Marian S. Honeyman, App. v. Herbert G. Hanan, 81 L.Ed. 476, 300 U.S. 14;

Florida East Coast Railway Company v. United States, Interstate Commerce Commission, et al., 234 U.S. 167, 58 L.Ed. 1267.

HOW QUESTIONS WERE RAISED BELOW

Our rights under the Fourteenth Amendment were raised below in the Complaint, Record page 4, and by Mr. Bliss in his Complaint in Intervention, Record page 15. See also Petition for Reargument, Record page 76, Section IX.

THE QUESTIONS ARE SUBSTANTIAL

We believe that the Fourteenth Amendment of the Constitution of the United States as applied to the field of zoning of property all over the United States is a matter of the greatest importance, if we are to have a Rule of Law. We believe it a matter of the greatest importance that a State Supreme Court be not permitted to avoid the impact of the Fourteenth Amendment by misapplying the law or facts, both of which we assert was done in this case.

The amount involved to the appellants is over $150,000.

If State courts are permitted, by the methods used here, to whittle away at the Fourteenth Amendment, local administrators dealing with zoning will throw off the limited restraint they have previously felt in dealing with the rights of persons to the protection of their property against confiscation.

Under the Minnesota statute authorizing rezoning by cities of the first class, which includes Minneapolis, the City of Minneapolis may not, without the consent of certain property owners, relieve this property of the restriction.

See Minnesota Statutes Annotated 416.18. The only exception is by rezoning the city as a whole or by rezoning a tract of at least forty acres in size. The entire city has been rezoned as recently as July 19, 1963 and it cannot be expected that it will be found that a forty acre tract needs rezoning within the foreseeable future. The neighbors will not consent. Unless the ordinance is void and this Court will so declare, the property in question is condemned to uselessness.

Respectfully submitted,

JOSIAH E. BRILL
510 Builders Exchange
Minneapolis, Minnesota 55402
Counsel for Appellants

APPENDIX A

No. 152 . Hennepin County Otis, J.

Maurice M. Filister, plaintiff,
and J. J. Bliss, intervenor,

Appellants,

39530 vs.

City of Minneapolis, defendant,
and William H. Borgert, et al,
intervenors,

Respondents.

Endorsed
Filed December 31, 1964
Mae Sherman, Clerk
Minnesota Supreme Court.

SYLLABUS

1. In a declaratory judgment action to set aside zoning restrictions claimed to be confiscatory, the court has no jurisdiction to enforce a proposal contained in plaintiffs' prayer for relief which would limit use of their property to a specific type of apartments if the ordinance is found to be invalid.

2. A finding that lowland zoned for single-family residential purposes has, or can economically be made to have, some substantial value, *held* to be sustained by the evidence.

3. An owner whose land is not suitable for the type of construction permitted by a zoning ordinance has a duty to challenge the propriety of its restrictions before neighboring property has been developed in reliance on their validity.

Affirmed.

OPINION

OTIS, Justice.

Appellants seek a declaratory judgment which will free their real estate from the restrictions of a Minneapolis zoning ordinance limiting construction to single-family dwellings. The appeal is from a judgment denying them relief.

The property consists of 8 2/3 acres of unimproved land located west of Ewing Avenue and lying between the Great Northern railroad tracks on the north and West 22nd Street on the south, in the city of Minneapolis. On April 3, 1924, this and the surrounding area were zoned for one- and two-family residences. The neighborhood has been developed in compliance with these restrictions. Plaintiff J. J. Bliss purchased the property at a tax sale on June 22, 1952, for a consideration of $3,800. A new comprehensive zoning ordinance was adopted July 19, 1963, permitting only single-family detached dwellings and buildings designed for educational, religious, and similar purposes. Very shortly thereafter, on August 20, 1963, Bliss granted plaintiff Maurice M. Filister an option to purchase the property for $56,000, the consideration being $1,000.

The only issue presented by the complaint is whether, because of the topography of plaintiffs' property, the zoning restrictions render it valueless and therefore constitute a confiscatory and unconstitutional taking. All but 15 or 25 percent of plaintiffs' tract is lowland. There was extensive testimony concerning the cost of preparing it for construction. It is undisputed that most of the land would require grading, filling, and piling in order to make it suitable for building. Plaintiffs vigorously contend that the evidence requires a finding that the cost of preparing the soil for construction would equal or exceed the value of

the land after it was thus improved. Hence, plaintiffs assert that the ordinance is invalid. However, they accompany their prayer for relief with an offer to confine their use to the erection of 10 apartment buildings, 2 1/2 stories in height, containing 23 units each. Plaintiffs allege they can thereby salvage sufficient value to make the project economically feasible. They agree to submit to the jurisdiction of the district court to permit the enforcement of any decree which limits development to the purposes suggested.

A number of adjacent property owners have intervened to contest the plaintiffs' claims. It is undisputed that they have bought and built homes in reliance on the existing ordinance.

The parties have stipulated that it would be futile for plaintiffs to pursue their administrative remedies by seeking a rezoning in the manner provided by law. More than one-third of the property owners located within 100 feet of plaintiffs' tract would object to this procedure.[1]

The trial court found among other things:

"That approximately the northerly one quarter of said described property can be developed for single family usage without the necessity of piling; that approximately the southerly three quarters of said described property can be developed for single family usage with the aid of piling; that the entire property, in addition to said piling, will require some fill to bring it up to proper grade; that the total cost to the plaintiffs of lots so piled and filled would be somewhat less than the value of building lots of comparable size in the area; that the development of the plaintiffs' property into lots reasonably comparable to other lots

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[1]Minn. St. 462.18. But see, State ex rel. Foster v. City of Minneapolis, 225 Minn. 249, 97 N. W. (2d) 273.

in this area by such piling and fill is reasonably economically feasible."

As a conclusion of law the court held that the ordinance was not unreasonable, confiscatory, arbitrary, and void, and dismissed the complaint. In an accompanying memorandum the court laid stress on the fact that plaintiffs had knowledge of the zoning when they acquired their interests; that the consideration they paid reflected the economic problems created by the ordinance and the topography; that the surrounding area had undergone no change in character since the adoption of the ordinance; that no new restrictions were imposed after plaintiffs acquired their interest; and that the mere fact the property would have greater value if used for multiple-family buildings had no bearing on the validity of the ordinance.

1. In our opinion the ordinance must stand or fall on considerations other than plaintiffs' offer to confine their construction to the erection of the apartment units which Filister proposes to build. This is not an equitable proceeding but a statutory action for a declaratory judgment. We find no precedent for conditioning plaintiffs' rights on an agreement to carry out Filister's plans under the jurisdiction of the court. Obviously, Filister cannot be compelled to exercise his option, and neither the district court nor this court has jurisdiction to require Bliss to confine his use to that which is proposed by Filister. Plaintiffs' proposal therefore has no force or effect, and if the ordinance is found to be invalid the property may be devoted without restriction to either residential, commercial, or industrial purposes, until and unless it is validly rezoned.

2. Most of the voluminous record bears on the cost

of preparing the property for construction. The testimony with respect to the value of the property in its unimproved condition is sketchy and inconclusive. Although we have some hesitation in relying on evidence of this kind, we believe the court's finding that the property has, or can economically be made to have, some substantial value is not wholly without support in the record. Mr. Bliss himself testified that before he completely understood the soil problems he thought $8,000 an acre was a reasonable value for purposes of sale. One of plaintiffs' own experts stated that in his opinion the land had a value of $2,500 an acre, although he later indicated his estimate related only to school and church uses. There was hearsay testimony, admitted without objection, that plaintiffs' real estate agent had declined an offer of $40,000 for the property. This evidence, together with the price of $56,000 contained in Bliss' option to Filister, lends support to the court's conclusion that the real estate did have substantial value and the ordinance as applied to plaintiffs was not therefore unreasonable, confiscatory, arbitrary, or void.

3. None of the cases cited by any of the parties deals squarely with a situation where real estate has been deprived of all practical use by restrictive zoning under circumstances where surrounding property owners would be adversely affected by holding the ordinance unconstitutional. The problems of confiscation have not been considered vis-a-vis the problems of estoppel and laches. Cases cited by plaintiffs as controlling involve rezoning more restrictively after acquisition in reliance on existing ordinances;[2] zoning for residential purposes in areas unsuited for

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[2]Alexander v. City of Minneapolis, 267 Minn. 155, 125 N. W. (2d) 583.

such use where no dwellings had yet been constructed on neighboring property;[3] ordinances excluding business activities in areas surrounded by commercial property;[4] rezoning of lowlands to preserve them in their natural state as a catch basin and wildlife refuge;[5] and ordinances which would make the property unusable for any purpose without the sale to, or purchase from, contiguous owners to create an adequate area on which improvements might lawfully be built.[6]

There is a division of authority on what weight is to be given to the fact a buyer has notice of a restrictive ordinance at the time of purchase, as well as on the question of what effect is to be given protracted acquiescence by an owner after adoption of such an ordinance. In the process of dealing with the validity of particular zoning ordinances, a number of decisions have included as a makeweight the fact that the property was purchased with actual or constrictive notice of existing zoning restrictions.[7] It has been held that—

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[3]Arverne Bay Const. Co. v. Thatcher, 278 N. Y. 222, 15 N. E. (2d) 587, 117 A. L. R. 1110.

[4]McGiverin v. City of Huntington Woods, 343 Mich. 413, 72 N. W. (2d) 105; Pearce v. Village of Edina, 263 Minn. 553, 118 N. W. (2d) 659.

[5]Morris County Land Imp. Co. v. Parsippany-Troy Hills Township, 40 N. J. 539, 193 A. (2d) 232.

[6]Peters & Whalen, Inc. v. Schnetzer, 194 N. Y. S. (2d) 333; see, also, Long Island Land Research Bureau v. Young, 159 N. Y. S. (2d) 414.

[7]Dishler, Appellant, v. Zoning Bd. of Adjustment, 414 Pa. 244, 199 A. (2d) 418; Cooper, Appellant, v. Bd. of Adjustment, 412 Pa. 429, 434, 195 A. (2d) 101, 103; Kuiken v. County of Cook, 23 Ill. (2d) 388, 394, 178 N. E. (2d) 338, 342; American Nat. Bank & Trust Co. v. City of Chicago, 30 Ill. (2d) 251, 195 N. E. (2d) 627; People ex rel. Fordham M. R. Church v. Walsh, 244 N. Y. 280, 155 N. E. 575; State ex rel. Howard v. Village of Roseville, 244 Minn. 343, 348, 70 N. W. (2d) 404, 408.

"* * * mere acquiescence, regardless of the period thereof, cannot legalize a clear usurpation of power which offends against the constitution adopted by the people."[8] We tend to the view that knowledge of the restriction does not in itself create an estoppel if the ordinance has at the time of its adoption deprived the property of all practical use. There is no logical reason why one who purchases with notice of such an ordinance but has sufficient vision and initiative to believe that the property is illegally zoned should not have the same standing he would have enjoyed had he been the owner at the time the ordinance was adopted. Nor do we believe the amount of the consideration is entitled to any weight. There should not be one rule for a purchaser who drives a hard bargain and a different rule for one who pays a more substantial price.

Our views are well summarized in Hodge v. Luckett (Ky.) 357 S. W. (2d) 303, 305. There, as here, the property owners challenged the propriety of a zoning ordinance restricting use to residential purposes where 50 to 80 percent of the property was low and marshy. The Kentucky court succinctly noted that the time for an owner to speak is when the zoning ordinance is first adopted and not after others have invested in neighboring property in reliance on the restriction.

"* * * True, his property ought not to be forever consigned to oblivion, but if he has remained silent when he

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[8]Forbes v. Hubbard, 348 Ill. 166, 176, 180 N. E. 767, 771; La Salle Nat. Bank v. City of Evanston, 24 Ill. (2d) 59, 64, 179 N. E. (2d) 673, 676; Robyns v. City of Dearborn, 341 Mich. 495, 500, 67 N. W. (2d) 718, 720; Barney & Carey Co. v. Town of Milton, 324 Mass. 440, 445, 87 N. E. (2d) 9, 13. The facts in the last case are strikingly similar to those in the instant case except for the crucial element of detriment to surrounding residences, which were found to be adequately isolated.

should have spoken it is no injustice to impose the condition that in order to justify a reclassification he show by clear and convincing proof that there will be no substantial resulting detriment to others."

As applied to the facts of the instant case, we believe plaintiffs and their predecessors in interest have been guilty of laches. Courts have been solicitous of the rights of surrounding property owners in passing on the propriety of zoning restrictions. In sustaining a conviction for violating an ordinance limiting the use of property to residential purposes, we have stressed the fact that neighboring homeowners had purchased property and built homes in reliance on residential zoning. State v. Modern Box Makers, Inc. 217 Minn. 41, 49, 13 N. W. (2d) 731, 735. In that case we pointed out that defendant acquired his land 13 years after the zoning ordinance was adopted and that the owner at the time of its adoption having made no objection, "defendant is in no position, equitable or otherwise, to claim that an injustice is being done it." That the construction of apartment buildings, however attractively planned, is likely to affect adversely surrounding residential dwellings is not only supported in the record but to some extent is a matter of judicial notice. The attitude of this court is reflected in State ex rel. Twin City Bldg. & Investment Co. v. Houghton, 144 Minn. 1, 19, 174 N. W. 885, 176 N. W. 159, 162, and in State et rel. Beery v. Houghton, 164 Minn. 146, 149, 204 N. W. 569, 570, affirmed, 273 U. S. 671, 47 S. Ct. 474, 71 L. ed. 832, where we said:

"* * * In large cities, where the lots for residences must necessarily be of the minimum size, especially where the man of small means must dwell, it is readily seen that if a home is built on such a lot and thereafter three-story apart-

ments extending to the lot line are constructed on both sides of the home it becomes almost unlivable and its value utterly destroyed. Not only that, but the construction of such apartments or other like buildings in a territory of individual homes depreciates very much the values in the whole territory."

The United States Supreme Court cited the latter case in Village of Euclid v. Ambler Realty Co. 272 U. S. 365, 47 S. Ct. 114, 71 L. ed. 303, and went on to observe (272 U. S. 394, 47 S. Ct. 120, 71 L. ed. 313):

"* * * With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities,—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a

different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances."

It is our conclusion that the disposition of this case should be governed by the principles applied in the Hodge decision. Plaintiffs and their predecessors in interest remained passive when they had a duty to act. Hence, in these proceedings it was not only incumbent on the plaintiffs to show that the ordinance was confiscatory, but they had the burden of proving by clear and convincing evidence that the relief they sought would not result in any substantial detriment to neighboring property improved in reliance on the validity of the ordinance. Here the proof is deficient in both respects. The judgment is therefore affirmed.

Affirmed.

APPENDIX B

(Petition Denicd)

State of Minnesota

OFFICE OF CLERK OF SUPREME COURT

St, Paul, Minn.

March 9, 1965

Maurice M. Filister
and
J. J. B'iss, intervenor,

Appellants,

vs. 39530

City of Minneapolis,

Respondent,

William H. Borgert, et al, intervenors,

Respondents.

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,

MAE SHERMAN,
Clerk Supreme Court.

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FILED
JUN 23 1965

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 184

MAURICE M. FILISTER AND J. J. BLISS

Appellants

vs.

CITY OF MINNEAPOLIS AND WILLIAM H. BORGERT, FLORENCE H. BORGERT, HAROLD G. BROTHERS, SALLY BROTHERS, JACK A. ISAAMAN AND IVY ISAAMAN

Appellees

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

JOINT MOTION TO DISMISS APPEAL

ARVID FALK*
Assistant City Attorney
333 City Hall
Minneapolis, Minnesota 55415
KEITH M. STIDD
City Attorney
D. J. SHAMA
Assistant City Attorney
Attorneys for Respondent, City of Minneapolis
KENNETH W. GREEN*
845 Northwestern Bank Building
Minneapolis, Minnesota 55402
JOHN R. GOETZ AND FREDERICK W. THOMAS
Attorneys for Respondents William H. Borgert, Florence B. Borgert, Harold G. Brothers, Sally Brothers, Jack A. Isaaman and Ivy Isaaman

*Counsel of Record

Supreme Court Brief Prtg. Co., Minn., Minn. 55415

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In the
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Appellees

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

JOINT MOTION TO DISMISS APPEAL

The appellees jointly move the court to dismiss the appeal from the judgment of the Supreme Court of Minnesota on the ground that it does not present a substantial federal question and on the ground that the judgment rests on an adequate non-federal basis.

SUMMARY OF THE CASE

In issue is the validity of the comprehensive zoning ordinance of the City of Minneapolis as applied to approximately eight acres of unimproved land located in that city.

Ever since 1924, and long before the acquisition of any interest in the land by either of the appellants, the use of the land was restricted by the applicable zoning ordinance to single-family detached dwellings and certain other non-commercial uses excluding apartment buildings. Appellants claimed that the cost of putting the land in suitable condition for the erection of single-family homes would exceed the market value of the land after being put in such condition, and that therefore the ordinance as applied to the land in question is confiscatory in violation of the Fourteenth Amendment as well as the Constitution of the State of Minnesota.

Appellees Borgert et al., neighboring landowners, intervened in the action brought by appellants against the City of Minneapolis, seeking to protect their interest in preserving the residential character which the neighborhood had always possessed.

Appellant Bliss, who bought the property at a tax sale for $3,800 (R. p. 139, f. 3) was aware of the physical condition of the property when he acquired it (R. p. 143, f. 2). Appellant Filister holds only an option to purchase the land, which he is not obligated to exercise, and therefore has no interest in it (R. p. 1, f. 3).

After a trial without a jury the trial court found that the market value of the land after the improvements necessary to bring the land into condition for building would exceed the cost of such improvements (R. p. 29, f. 3). It found that "the development of the [appellant's] property into lots reasonably comparable to other lots in this area by such piling and fill is reasonably economically feasible" (R. p. 29, f. 1).

The Supreme Court of Minnesota affirmed the trial court's findings, holding that there was evidence to support

the court's conclusions. (Jurisdictional Statement, Appendix A, p. 17.)

The Minnesota Supreme Court also held that the principles of estoppel and laches were applicable to the conduct of appellant Bliss and his predecessors in interest, that therefore appellants had the burden of proving by clear and convincing evidence that the relief they sought would not result in any substantial detriment to neighboring property improved in reliance on the validity of the ordinance, and that they had not sustained this burden. (Jurisdictional Statement, Appendix A, p. 22.)

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

The constitutionality of the Minneapolis Zoning Ordinance is not challenged in this appeal, but only the constitutionality of its application to a small parcel of land acquired long after the zoning existed.

In arriving at their decisions both the trial court and the Supreme Court of Minnesota balanced the claimed right of one landowner against the vested rights of surrounding landowners. Private property rights on one side were weighed against those on the other. Weighing the evidence, the trial court decided that the appellants had failed to prove confiscation and the Supreme Court affirmed its findings; no essentially federal question is presented in this situation.

In an attempt to arrive at a federal question appellants ask this Court to find that both the trial court and the Supreme Court of Minnesota were wrong in deciding that there was evidence to support the conclusion that the market value of the land would be greater after improvement

than the cost of such improvement. Yet the record clearly shows that the trial court and the Supreme Court were right with respect to costs of improvement (R. p. 326, f. 3; R. p. 327, f. 1) and as to the probable market value of the land after being brought to normal condition (R. p. 250, f. 3; Defendant Intervenors' Exhibit 3; R. p. 307, f. 1; R. p. 375, f. 1. See also the opinion of the Supreme Court, Jurisdictional Statement, Appendix A, p. 17.) Only an issue of quantum of proof is presented here and this does not involve any federal question.

That no federal issue is actually present is made all the clearer by the fact that no recent action of any kind by the City of Minneapolis is complained of. The land has been zoned in its present manner since 1924, and the city has since that time done nothing to diminish its value. Appellant Bliss, fully aware of its physical condition, bought the land when it was zoned as it is presently zoned, and neither the city nor anyone else has taken from him anything that he ever possessed.

THE JUDGMENT APPEALED FROM RESTS ON AN ADEQUATE NON-FEDERAL BASIS

In addition to holding that the evidence supported the trial court's findings with respect to cost of improvement and subsequent market value, the Minnesota Supreme Court held that the interests of neighboring landowners must be weighed against those of the appellants (which principle is implicit in the recognition of the right of such landowners to intervene in the litigation) and that, because of their laches and those of their predecessors in interest, appellants had the burden, which they had not sustained, of proving that no substantial detriment to neighboring

property, improved in reliance on the validity of the zoning ordinance, would result from the erection of apartment buildings.

Appellants properly concede that laches or estoppel is a "non-federal issue" (Jurisdictional Statement, p. 4, Paragraph 5), but argue that the Supreme Court should not have considered this issue because it had not been raised in the lower court and also argue that the doctrine of laches and estoppel has no application with respect to an ordinance claimed to be invalid by reason of the Fourteenth Amendment. Both arguments are unsound.

In Paragraph III of its answer to the complaint, the City of Minneapolis pleaded as follows (R. pp. 7-8):

> "Alleges that if the plaintiff acquired any interest in the above property, he knew or he should have known that at all times said property was classified as a residence district under the ordinance of April 3, 1924 and as an R-1 district under the new comprehensive zoning ordinance, and that any interest acquired by plaintiff was subject to the provisions of the above mentioned ordinance and valid and effective against the plaintiff."

The intervenors' answer contained a substantially similar averment (R. p. 13). As noted above, the very appearance of the intervenors in the litigation was justified by their reliance as property owners on the zoning ordinance under attack.

Reliance and laches were proved in the trial court (R. p. 159, ff. 2, 3; R. p. 165, f. 3; R. p. 178, f. 2;* R. p.180, f. 1; testimony of Mrs. Smith, R. pp. 184-185).

---

*Witness "Because we built that home there for having our own homes. It was a district for all homes in there when I built it and that was fourteen years ago; there was not supposed to be any apartments in that place."

And in its memorandum forming part of its order the trial court stated:

> "It seems to the Court also that the rights of surrounding property owners who apparently have relied on such zoning provisions over a long period of time must also be included in the Court's interpretation of the validity of a zoning ordinance." (R. p. 46, f. 2.)

No constitutional right of the appellants is involved in this case, and if they possessed any such right it was lost by failure of themselves and their predecessors in interest to make a timely assertion of it. The applicability of laches to the assertion of constitutional rights has been recognized by other state courts. In *Fifth Church of Christ Scientist in Denver v. W. F. Pigg & Son,* 109 Colo. 103, 122 P. 2d 887, the court stated:

> "It thus appears that for approximately fourteen years the owners of the property here involved had entirely acquiesced in its zoning classification while others made large investments relying thereon which would now be materially depreciated by the proposed elimination of the status quo."

In *Wilson v. School District of Philadelphia,* 328 Pa. 225, 244, 195 Atl. 90, 100, the Supreme Court of Pennsylvania declared:

> "No principle has become more firmly established in the field of constitutional law than the fact that a person may effectively by acts or omission waive a consitutional right to the protection of which he would otherwise be entitled, provided the waiver does not run counter to public policy or public morals. This is nothing more than the equitable doctrine of estoppel applied in the realm of constitutional law and is uni-

formly upheld in cases where the constitutional provision is solely protective of property rights."

The principle stated in these cases, which is dispositive of the motion to dismiss, was recognized by this Court in *Pierce v. Somerset Railway,* 171 U. S. 641, 648, 19 S. Ct. 84, 43 L. Ed. 316 as follows:

> "A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States, as well as under a statute, and the question whether he has or has not lost such right by his failure to act, or by his action, is not a Federal one."

Respectfully submitted,

ARVID FALK*
Assistant City Attorney
333 City Hall
Minneapolis, Minnesota 55415
KEITH M. STIDD
City Attorney
D. J. SHAMA
Assistant City Attorney
Attorneys for Respondent, City of Minneapolis
KENNETH W. GREEN*
845 Northwestern Bank Building
Minneapolis, Minnesota 55402
JOHN R. GOETZ AND FREDERICK W. THOMAS
Attorneys for Respondents William H. Borgert, Florence B. Borgert, Harold G. Brothers, Sally Brothers, Jack A. Isaaman and Ivy Isaaman

*Counsel of Record

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 184

MAURICE M. FILISTER AND J. J. BLISS

Appellants

VS.

CITY OF MINNEAPOLIS AND WILLIAM H. BORGERT, FLORENCE H. BORGERT, HAROLD G. BROTHERS, SALLY BROTHERS, JACK A. ISAAMAN AND IVY ISAAMAN

Appellees

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

RESPONSE TO MOTION TO DISMISS APPEAL

JOSIAH E. BRILL
510 Builders Exchange
Minneapolis, Minnesota 55402
Attorneys for Appellants

Hayward-Court Brief Prtg. Co., Mpls., Minn. 55415

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ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

RESPONSE TO MOTION TO DISMISS APPEAL

At page 2, the appellees correctly state:

> "* * * the use of the land was restricted by the applicable zoning ordinance to single-family detached dwellings and certain other non-commercial uses excluding apartment buildings."

However they neglected to inform the Court that by stipulation at the trial it was agreed that the data concerning costs and values would apply without specific proof to all uses permitted under the ordinance, including such things

as public buildings, churches and school houses (R. p. 203, ff. 1-2-3; R. p. 204, ff. 1-2-3).

On the same page, the appellees referred to the "residential character which the neighborhood had always possessed." By looking at Exhibit A, the Court will see that plaintiffs' eight acre tract involved in this lawsuit was bounded on the east on the other side of the street by neighboring landowners, on the north by railroad tracks, on the west by another municipality and on the south by several acres of vacant land belonging to the appellants.

Also on the same page is the reference to the fact that Bliss bought the property for $3,800 at a tax sale. Appellees neglected to point out that in the opinion of the Supreme Court of Minnesota this point was noted to be without merit. See Jurisdictional Statement, top of page 19.

Also at page 2 it was stated that the court found that the market value of the land after the improvements necessary to bring the land into condition for building would exceed the cost of such improvements. What the court said was quite different See Record p. 29, folio 1:

> "that the total cost to the plaintiffs of lots so piled and filled would be *somewhat* less than the value of building lots of comparable size in the area." (Emphasis supplied.)

That was a finding of fact. This finding of fact is not referred to in the motion to dismiss. The court then added the following statement:

> "that the development of the plaintiffs' property into lots reasonably comparable to other lots in this area by such piling and fill is reasonably economically feasible."

This statement is merely a conclusion from the finding of fact above quoted. This Court is in a position to judge whether that conclusion was justified.

"Somewhat" is defined as meaning "in some degree or measure; a little." *Atchison, T. & S. F. R. Co. v. Vanordstrand*, 73 P. 113, 115, 67 Kan. 386. See dictionary definition.

The statement at the bottom of page 2 that the Supreme Court of Minnesota held "that there was evidence to support the court's conclusions" is not quite accurate. What the Court said as shown in our Jurisdictional Statement at page 17, was:

> "Although we have some hesitation in relying on evidence of this kind, we believe the court's finding that the property has, or can economically be made to have, some substantial value is *not wholly* without support in the record." (Emphasis supplied.)

Then the Court went on to indicate what it considered support:

> "Mr. Bliss himself testified that before he completely understood the soil problems he thought $8,000 an acre was a reasonable value for purposes of sale. One of the plaintiffs' own experts stated that in his opinion the land had a value of $2,500 an acre, although he later indicated his estimate related only to school and church uses. There was hearsay testimony, admitted without objection, that plaintiffs' real estate agent had declined an offer of $40,000 for the property. This evidence, together with the price of $56,000 contained in Bliss' option to Filister, *lends support* to the court's conclusion that the real estate did have substantial value and the ordinance as applied to plaintiffs was not therefore unreasonable, confiscatory, arbitrary, or void." (Emphasis supplied.)

I have already commented to some extent upon this attempt by the Court to buttress the lower court's conclusion. See page 10 of our Jurisdictional Statement. I should like to add that the expert's statement that the value of $2,500 an acre was not allowed to stand by the lower court and was excluded by virtue of the stipulation between the parties. See Record p. 237, folios 1-2-3.

The hearsay statement that a real estate agent declined an offer of $40,000 for the property (R. p. 394, f. 1) was answered by Bliss (R. p. 153, 154). It is also to be noted that the option price of $56,000 was to be taken advantage of only in the event rezoning occurred (see option agreement on file).

It is also to be noted that the Supreme Court misstated the finding of the lower court when it decided that certain stated facts "lend support to the Court's conclusion that the real estate did have substantial value." This is in our Jurisdictional Statement at page 17.

Under the heading "The Appeal Does Not Present A Substantial Federal Question", Motion page 3, it is asserted that the Supreme Court of Minnesota balanced the claimed right of one landowner against the vested rights of surrounding landowners. Its claim that the surrounding landowners had vested rights is not backed by authority. The landowners are referred to as "surrounding landowners." Of course, as is indicated above, they are not *surrounding* landowners. Nor is there any evidence whatsoever that the landowners in question would be injured. The undisputed evidence is to the contrary. See Record pages 243, 245.

On the fundamental issue of the extent to which the value of plaintiffs' property was destroyed, it is asserted at page 4 as follows:

> "Yet the record clearly shows that the trial court and the Supreme Court were right with respect to costs of improvement (R. p. 326, f. 3; R. p. 327, f. 1) and as to the probable market value of the land after being brought to normal condition (R. p. 250, f. 3; Defendant Intervenors' Exhibit 3; R. p. 307, f. 1; R. p. 375, f. 1. See also the opinion of the Supreme Court Jurisdictional Statement, Appendix A, p. 17). Only an issue of quantum of proof is presented here and this does not involve any federal question."

With respect to the testimony at page 326 of the record, appellees spelled out in cross examination what they claim is the average cost of making the lot suitable, i.e., averaging the upper 1/4 of the property with the remaining 3/4. (The average should have been between the upper 15% and the remaining 85% which would have brought the average up.) Moreover the item of $300 for additional waterproofing on the houses on smaller sized lots to which this cost was applied is not taken into account. Costs of waterproofing on larger houses would be proportionately more.

The record at page 250 deals with the average value of the lots after they were made suitable for the use under the present zoning, as given by our expert who is uncontradicted. Appellees do not attempt to carry the calculation forward to any conclusion.

Record page 440, Exhibit 3 is merely a typewritten statement of Mr. Garzon as to *sale prices* of lots in the adjoining block.

The statement above quoted from appellees' motion to dismiss refers to both phases of the problem. One has to do with costs, and the other has to do with market value. With respect to the matter of costs, the following must be taken into consideration:

Mr. Vasatka, defendants' expert, gave the cost of putting the property in suitable condition at $3,060 on the average, not $3,000 (R. p. 326, f. 3 and R. p. 327, f. 1).

Mr. Gullickson did give the figure of $2,700 as the average value of lots 60 x 130 feet (R. p. 377, f. 1). The average of $2,700 was clarified through cross examination by Mr. Shama in Record page 378, f. 1 where he said:

> "My valuation is based on $40.00 a front foot up near the railroad; $50.00 a front foot for the good lots down to the south end. * * *"

It follows from his testimony that the lots which were not near the railroad and which had a front of 60 feet were, according to him, worth $3,000 and lots of the same size near the railroad were worth $2,400. As against the $3,000 value of the good lots not near the railroad, we used Mr. Vasatka's cost of making the land suitable of $4,511, which is $1,511 more than the value of the lots. It is clearly apparent that this attempt at averaging is wholly unrealistic.

With respect to the testimony of Mr. Garzon (R. p. 440), the reference is to Defendant-Intervenor's Exhibit 3 which is a typewritten statement by Mr. Garzon, the City Assessor, as to the sale prices of a few lots in the block adjoining plaintiffs' property. The fact is that Mr. Garzon gave no opinion whatsoever as to the value of the plaintiffs' property. His testimony was objected to as being clearly inadmissible. (R. p. 440, f. 2.) The court received it subject to our objection (R. p. 440, f. 2).

See the case of *State, by Lord v. Winiecki*, 263 Minn. 91, as follows:

> "It is well settled that in condemnation proceedings

> the consideration paid for other property even when adjacent to the tract involved, and evidence with reference to sales prices involved in recent sales in the vicinity is inadmissible as substantive proof of the reasonable market value of the lands involved in the condemnation proceedings. *Stinson v. Chicago, St. P. & M. Ry. Co.* 27 Minn. 284, 6 N. W. 784; *Board of Education v. Heywood Mfg. Co.* 154 Minn. 486, 192 N. W. 102; *Minneapolis-St. Paul Sanitary Dist. v. Fitzpatrick*, 201 Minn. 442, 277 N. W. 394, 124 A. L. R. 897. The basis for the rule is readily understood. It is very seldom that two properties are alike in every respect, so that the price paid for one would be a clearcut indication as to the reasonable market value of the other. The surrounding circumstances, the reasons for the sale or purchase, and many other factors may affect the sales price of the one but in no way affect the value of the other. It is clear that here unless the challenged evidence became admissible because of questions asked by opposing counsel on cross examination, neither the written appraisal report nor the oral testimony with respect thereto was admissible."

With respect to Mr. Garzon's testimony, we asked the trial court to indicate whether or not it had relied upon it (R. p. 36) and the court responded (R. p. 45, f. 3):

> "As to the rulings of the Court on the evidence taken subject to the objection they are included in the Court's ultimate decisions and conclusions of law."

It is evident that the Supreme Court of Minnesota did not rely upon Mr. Garzon's testimony as to value because it could not have done so without violating its own decision on the point and secondly, because if it had done so it would clearly have made some statement about it which it did not do.

Under the heading, "The Judgment Appealed From Rests On An Adequate Non-Federal Basis," the appellees referred at page 5 to the pleadings. We submit that the pleadings have no relation to laches or estoppel because they do not plead reliance on the plaintiff's inaction or detriment to anybody. See *French v. Lindh-Gustafson-Klopper Company, Inc.*, 216 Minn. 52 and *Macomber v. Kinney*, 114 Minn. 146, 128 N. W. 1001; *Minn. Rules of Practice*, Sec. 8.03. It can hardly be assumed that the Minnesota Supreme Court intended to overrule these cases when it does not say anything about it. What the Court did was to say that they were relying upon the Kentucky case, *Hodge v. Luckett*, (Ky.) 357 S. W. 2d 303, 305, which we shall discuss now.

The Kentucky Court indicated in the opening statement that this is a "spot zoning" controversy. The lower court was reversed on the question of fact as to whether or not the property was suitable for residential purposes. The Supreme Court of Kentucky found as a fact that:

> "Only the westernmost portion of the property, variously estimated from 20% to 50%, could possibly be developed for residential use under existing circumstances."

The Court also found that:

> "Actually its suitability for residential purposes is a relative proposition. Foeman himself lives on it. It is suitable for pasture and truck gardening, having been so used all along."

The Court also found that:

> "An industrial concern might be willing to pay a high price for the whole 18½ acres in this case in order

> to utilize only that portion which is fit for residential construction, leaving the marshy bottom even less used than it is at present. The practical result of rezoning would thus be limited to that portion of the property which in fact is not distinguishable in condition or character from the surrounding residential area and which there is absolutely no basis to rezone."

The Fourteenth Amendment is not mentioned. Nor was it claimed that the land would be wholly valueless or that substantially all the value would be taken. The Supreme Court on the basis of the facts found to the contrary.

Our Supreme Court, quoted that portion of this opinion where the Court said at page 305:

> "True, his property ought not to be forever consigned to oblivion * * *."

The idea that it was being consigned to oblivion is just not true. The Court held that 20% to 50% of the property could be developed for residential use under existing circumstances and that it was all being used for some practical purpose in any event and that the proposed use was only for that portion that could be used for residential purposes.

This language could not have been intended to apply to the facts in the case under consideration by the Kentucky Court as is clearly evident from its context. How can it be said that property would be consigned forever to oblivion in the face of the findings in the opinion above quoted? The Kentucky case is a simple case in which the parties sought to have property rezoned on the ground that the property was not suitable for residential purposes and the Court found as a matter of fact to the contrary. All of the language in that case about laches or estoppel are plainly not necessary to the decision.

It seems perfectly clear that there is nothing whatsoever in that case to make it applicable to the undiputed facts in our case.

It is next asserted by appellees at page 5 that reliance and laches were proved in the trial court. The lower court did not so understand it and *made no finding to that effect*. When the court refused to receive testimony, from one of these property owners on the question of increased traffic (R. p. 160, f. 3), it clearly indicated that the only reason it was permitting them to testify was to give their reasons for refusing to consent and not on any other issue in the case.

The property owners referred to testified to nothing but the reasons why they would not consent to the rezoning. None of them testified that they had any knowledge concerning the way in which the plaintiffs' property was zoned. None of them testified to any detriment and, of course, they did not testify to relying upon the way the plaintiffs' property was zoned because they apparently knew nothing about it. On the other hand the only testimony on the question of detriment was to the contrary.

The comment of the lower court referred to at page 6 of the motion was hardly a finding of estoppel and certainly was no finding of detriment.

With respect to the authorities cited by appellees on the subject of laches and waiver, it is to be noted that in the case of *Fifth Church Christ Scientist in Denver v. W. F. Pigg & Son*, 109 Colo. 103, 122 P. 2d 887, cited by appellees, the Court expressly found the making of large investments, while relying upon fourteen years of acquiescence.

In the case of *Wilson v. School District of Philadelphia*, 195 Atl. 90, cited by appellees, the Court referred to

Cooley's Constitutional Limitations (8th Ed.) page 368 et seq. in which Mr. Cooley said:

> "There are cases where a law in its application to a particular case must be sustained, because the party who makes objection has, *by prior action*, precluded himself from being heard against it."

He gives illustrations such as one who received a compensation award or brought an action to recover it as illustrative of the type of action he refers to. He also gives an illustration of a person obtaining a license under an ordinance alleged to be unconstitutional and when the license was revoked questioned its constitutionality, and other illustrations of the same type. These hardly help the appellees.

In the case of *Pierce v. Somerset Railway*, 171 U. S. 641, 648, 19 S. Ct. 84, 43 L. Ed. 316, cited by appellees, the quotation given at page 7 of the motion does not present the situation fairly. As a matter of fact the Court spent a great deal of time discussing the evidence and nowhere did it indicate that the evidence did not fairly justify the conclusion on the issue of estoppel or waiver. The situation is different in a case like ours where we asserted the facts upon which to reach the conclusion, that there was nothing in the record to justify finding of estoppel or laches. This Court has held that under such circumstances they will not be bound by the decision of the state court.

I should like to add a few cases in addition to those previously cited in our Jurisdictional Statement on the question of whether or not under the circumstances in this case the decision based in part on a non-federal ground should be used as a basis for declining jurisdiction.

The broadest statement for the rule concerning this decision we have been able to find is found in *Staub v. Baxley*, 355 U. S. 313, 2 L. Ed. 2d 302, 78 S. Ct. 277, where the Court said at page 309 as follows:

> "Whether the constitutional rights asserted by the appellant were '* * * given due recognition by the [Court of Appeals] is a question as to which the [appellant is] entitled to invoke our judgment, and this [she has] done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support * * * [for] if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided.' *Ward v. Love County*, 253 U. S. 17, 22, 64 L. Ed. 751, 758, 40 S. Ct. 419, and cases cited."

In the case of *Williams v. Kaiser*, 89 L. Ed. page 398, 323 U. S. 471, the Court said at page 403 of the Law Edition opinion as follows:

> "We adhere to those decisions. But it is likewise well settled that if the independent ground was not a substantial or sufficient one, 'it will be presumed that the state court based its judgment on the law raising the Federal question, and this court will then take jurisdiction.' "

In the case of *Honeyman v. Hanan*, 81 L. Ed. 476, 300 U. S. 14, the Court said in syllabus #3 as follows:

> "The determination by the Supreme Court of the United States that a Federal question was necessarily passed upon by the state court of whose decision

> review by the Supreme Court of the United States is sought, and whether its decision of that question was necessary to determination of the cause, must rest upon an examination of the record; and a certificate or statement by the state court that a Federal question has been presented to it and necessarily passed upon is not controlling."

In the case of *McCoy v. Shaw*, 72 L. Ed. 891, the rule had been somewhat restricted as indicated by the headnote No. 1 in the Law Edition citation reading as follows:

> "A judgment of a state court which is put upon a non-Federal ground, independent of the Federal question involved and broad enough to sustain the judgment, cannot be reviewed by the Supreme Court of the United States, unless the non-Federal ground is so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent the review of a decision upon the Federal question."

Even under this statement of the rule, we believe this Court ought to accept jurisdiction because the statement in that headnote applies clearly to our case.

A few of the instances illustrating the applicability of that statement to this case are:

(a) The attempt of the court to base its decision upon estoppel and laches, when the issue was not raised in the pleadings, in the court below or passed upon by that court or raised at any time by the parties but only by the Supreme Court at the oral argument contrary to the decisions in the Minnesota Supreme Court, this may not be done.

(b) Finding laches or estoppel on the basis of statements of fact in the opinion expressly contrary to the record as already indicated.

(c) Relying upon the Kentucky case which has been shown to be clearly not applicable.

(d) By trying to evade the decisions of this Court on the question of confiscation by misstating facts concerning the extent of the confiscation. In this connection it misstated the language in the lower court, it misstated the evidence and if it relied upon the testimony of Garzon as to sales in the adjoining block (as seems to be the view of appellees in their motion to dismiss), it violated its own rule.

In closing, it is significant to note that in the motion to dismiss, there is no attempt to refute the following important portions of our Jurisdictional Statement:

(1) At page 6 we said:

> "The defendants offered no testimony as to the fair market value of the plaintiffs' lots after the bad condition was corrected. The defendants did offer testimony over the objection of these appellants as to the price for which lots in an adjoining block have been sold but made no attempt to compare them with the lots involved in this case." (R. pp. 437-445).

(2) At page 7 we said:

> "Mr. Gullickson testified that the erection of the proposed apartment buildings would not reduce the market value of the properties in the neighborhood." (R. p. 388).

(3) At page 7 we also said:

> "That the trial court in its memorandum attached to its decision (R. p. 31, f. 3) found that approximately one-fourth of the tract consists of soil and subsoil which would not require piling. This finding com-

p'etely ignored the fact that even though this portion of the property did not require piling and the undisputed testimony was that it was less than 15% of the tract."

(4) Pages 7 and 8, statement of the law as found in the *Pennsylvania Coal Company* case:

"* * * The protection of private property in the Fifth Amendment * * * provides that it shall not be taken for such (public) use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. (Citing case.) When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

"The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. (Citing cases.) We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

(5) At page 8 we said:

"However, if necessary so to do, the Court will find, by an examination of the record above referred to, that the cost of making the land suitable was greatly in excess of the fair market value of the lots so made suitable on the undisputed testimony in the case."

(6) Page 9, subdivision (d) reads as follows:

"With respect to the appellants' offer to improve the property with a fine set of apartments beautifully landscaped instead of using it for other uses, which might be permitted there if the zoning was invalid (R. p. 263; Exhibits I, J & K and R. p. 266), such as industrial uses, the Court, apparently thinking that these were quite acceptable, said it could not compel the result because Filister might not exercise his option. (See opinion in Appendix.) It ignored the fact that Mr. Bliss, the fee owner, had made the same offer in his complaint in intervention (R. p. 15) and that if Filister abandoned his option, the fee owner would still be bound by the proposal. Moreover the Court could bind him under our Declaratory Judgment Statute, as was done in the case of *Morris County Land Improvement v. Township of Parsippany-Troy Hills*, 40 N. J. 539.

"Our Declaratory Judgment Statute (Minnesota Statutes Annotated 555.01 and Minnesota Statutes Annotated 555.08 for Supplemental Relief) shows that the Court can retain jurisdiction to compel performance of such a proposal. In fact, our Court did this without urging in the case of *Katherine Elizabeth Pearce and Marie Elizabeth Pearce v. Village of Edina*, 263 Minn. 553, 108 N. W. 2d 659."

(7) Page 10 reads as follows:

"The Court said, Mr. Bliss testified that he thought $8,000 an acre was reasonable for the land before he completely understood the soil problems. (See opinion). We find no such statement in the record, but if it was, it would not have any bearing on the case because we are not concerned for this purpose, with the land in good condition.

"Then the Court adds a 'final touch' by referring to

the option price as evidence of value. (See Option.) The record is conclusive that the option price would not be exercised unless the zoning was declared invalid."

Instead of attempting to answer our refutation of the Court's statement in this connection, appellees merely reassert the Court's statement. This would seem to indicate that there was no adequate answer to our refutation of that statement.

(8) We recite several reasons why we think the question is substantial at page 11 of our Jurisdictional Statement, none of which are questioned, either as to fact or importance.

In conclusion, we believe this Court ought if necessary, decide whether or not taking *almost* 100% violates the rule laid down in the *Pennsylvania Coal Company* case.

Respectfully submitted,

JOSIAH E. BRILL
510 Builders Exchange
Minneapolis, Minnesota 55402
Attorneys for Appellants

END